Supreme Court of the United States

OCTOBER TERM, 1949

NO. 173

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellants*,

vs.

UNITED STATES SMELTING REFINING AND MINING COMPANY, AMERICAN SMELTING & REFINING COMPANY, THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

Brief For Intervener—Utah Mining Association

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OPINIONS BELOW

Neither the findings of fact and conclusions of law (R. 449-463) nor the opinion (R. 474-477) of the District Court have been reported. The District Court opinion refers to, in part incorporates, and in part is based upon a previous opinion (R. 299-302) in a predecessor case also unreported. The decree of the District Court permanently enjoins an order of the Interstate Commerce Commission reported at 270 I.C.C. 385 (R. 315-321) (and one at 270 I.C.C. 359 (R. 364-375)). The previous decision of the District Court reviewed an order of the Interstate Commerce Commission reported at 266 I.C.C. 476 (R. 271-279) and 263 I.C.C. 749

(R. 330-341) (and those at 266 I.C.C. 349 (R. 29-52) and 263 I.C.C. 719 (R. 55-85)).

JURISDICTION

A final decree permanently enjoining the order of appellant Interstate Commerce Commission (defendant below) was entered by the District Court of the United States for the District of Utah (sitting as a three-judge statutory court) on January 10, 1949 (R. 463-464). Appeals by the Interstate Commerce Commission and the United States were allowed by the District Court on March 7, 1949 (R. 465). Probable jurisdiction was noted on October 10, 1949. Jurisdiction of the appeals is based upon the provisions of the Judicial Code as amended by the Act of June 25, 1948, 28 U.S.C. Sections 1253, 2101 (b).

INTRODUCTORY STATEMENT

The Utah Mining Association, hereinafter called the "Association," was allowed to intervene in these actions pursuant to Section 45a, Title 28, U.S.C.A. (now Section 2323 of new Title 28, U.S.C.A.) (R. 297, 445.).

The Association was formed for the purpose of advancing metal mining and its related industries within the State of Utah, and in general to support activities in behalf of metal mining and metallurgy. The membership of the Association represents more than ninety per cent of the non-ferrous ore production of Utah.

Due to the effect on the economy of the mining industry, the Association finds itself compelled to join with the plaintiff industries in asking that the final decree of the United States District Court for the District of Utah, entered on January 10, 1949, be sustained by this Court. The additional transportation cost which must necessarily result from the orders of the Interstate Commerce Commission will become an additional freight charge to the ore producers. If this decree be reversed and the original orders of the Interstate Commerce Commission, hereinafter referred to as the "Commission," entered on May

18, 1948, entitled "United States Smelting Refining and Mining Company," and as "American Smelting & Refining Company" under a general proceeding before the Commission entitled "Ex Parte 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services," are permitted to stand, an increase will result in transportation charges which the mining industry of Utah cannot at this time absorb.

ARGUMENT

I.

DUE TO INCREASED COSTS AND OTHER FACTORS THE METAL MINING INDUSTRY TODAY FINDS ITSELF IN A SERIOUS ECONOMIC CONDITION.

The mining industry in the West and particularly in Utah now finds itself in a rather unfortunate position. During the twelve year period from 1935 to 1946, there has been a decrease in the number of producing lode mines in the State of Utah from 203 to 89.[1] We also find that the number of lead and zinc producing mines in our western states decreased from 1401 in 1939 to 690 in 1944, although 1939 was a comparatively poor year for the western lead and zinc industry. Over 700 of the casualties were small or what are called marginal operators. These marginal mines are mines which produce a low grade type of ore and upon which a profit can only be made if the price for metals is sufficiently high and operating costs held at a minimum. The reason for the closing of so many of our mines is due to the tremendous increase in operating costs. Operating costs in 1948 per ton mined have at least doubled and in some cases tripled since 1939. Average labor costs per ton mined for the lead-zinc mining industry alone have increased 135 per cent over the average costs in 1939. Supply costs per ton mined show an average increase of 113 per cent in 1948 over 1939. For example, in 1939 an outlay in tools and equipment valued at $550.00 was re-

[1] See Minerals Year Books, Published by U. S. Bureau of Mines, Department of the Interior.

quired to advance a drift heading in a mine operation, whereas in 1948 a drift crew required a total of $8900.00 in tools and equipment.

In addition to the tremendous increases in labor and supply costs, the mine operator today is faced with such additional costs consisting of increasing demands for pensions and welfare plans.

The reports of the Utah State Tax Commission show that there were forty mines paying the Mine Occupation Tax in Utah in 1940 and in 1949 the number had decreased to twenty-one (a decrease of 47.5% over 1940).

The records in the office of the Secretary of the State of Utah show that in 1915 there were 159 new mining companies organized in Utah as against only 29 in 1948.

The downward trend in the number of operating mines is attributable to the higher operating costs, which include increases in wages, supplies, taxes and transportation charges, coupled with an unstable metal market due to large imports of foreign metals.

During World War II the Federal Government inaugurated what was called the "Premium Price Plan." This plan was created originally in 1942 under the first War Powers Act to make possible the control of the prices of metals, and was later amended and extended under O.P.A. to June 30, 1947, when it expired. Many mines were dependent upon the subsidy paid by the Government under the Plan for their continued existence, and upon the expiration of the Plan a number of mines closed and still remain closed. For these mines to reopen there must be a substantial reduction in mine operating costs, including a revision in the present tax structure applicable to mine operations.

In 1947 the Legislature of the State of Utah recognized the critical condition of the mining industry and to give it some aid and encouragement amended the Mine Occupation Tax Law by increasing the exemption from

$20,000.00 to $50,000.00.[2] This tax is an imposition of one per cent on the gross amount received from all metalliferous ores sold during any one year by any mine operating in Utah.

As further evidence of the serious condition of the metal mining industry, we refer to the survey of business conditions made by Secretary of Commerce Charles Sawyer and which was submitted by him to John R. Steelman, Assistant to the President, on December 23, 1949.

We quote from that survey:

> "By far the most serious problem raised in the Salt Lake City and Denver meetings was in connection with mining of nonferrous metals. During the summer there had been layoffs of over a thousand non-ferrous miners at Park City and in the Tintic District of Utah. It was reported that a very large number of mines throughout the mountain area had closed during the year; and figures were advanced to show that this was a secular condition dating back many years before the war. As for the immediate problem, it was stated that wartime premium prices did not provide profits adequate to permit new explorations and development, and that, in the meantime, higher grade ores had been depleted. Again, imports and price declines earlier this year were said to have further demoralized the domestic industry, though a reimposition of the lead tariff effective during the summer had improved that market somewhat.
>
> "It was the unanimous view of both labor and business representatives that the problem described in general terms above was one meriting extremely earnest consideration on the part of the federal government. It was feared that unless very vigorous action were taken the nation might jeopardize a basic security factor by becoming too largely de-

[2] Section 80-5-66, Utah Code Annotated 1943, as amended by Laws of Utah 1947, Ch. 108, and Laws of Utah 1949, Ch. 80.

pendent upon foreign sources for non-ferrous metals. There were suggestions that higher tariffs be imposed on imports. Great interest was expressed by a number of business and labor representatives in the mine subsidy and incentive arrangements suggested in the first session of the present Congress. However, it was the view of some businessmen that direct subsidies and incentives would prove to be only temporary correctives, and that more basic good would come from special tax arrangements under which the industry would be able to retain a larger share of its earnings for the financing of exploration and developmental costs and the installation of cost-reducing equipment."

The Department of Commerce also reports that business mortalities during the past year have been the heaviest in mining and manufacturing.

Another factor to consider is that with the closing of our marginal mines there results a loss in the total tonnage hauled by plaintiff carriers. The tonnage of ore hauled by plaintiff carriers from mines to smelters is substantial. Not only will this loss in tonnage occur within the state of origin but will be reflected in loss in interstate freight, as much of the metal produced in the western states is shipped by rail to the eastern sea coast for refining.

II.

THE ORDERS OF THE INTERSTATE COMMERCE COMMISSION IF SUSTAINED WILL RESULT IN A DOUBLE CHARGE FOR THE SAME SERVICES BEING IMPOSED UPON THE METAL MINING INDUSTRY.

The present practice in the entire non-ferrous metal industry has been in effect for over fifty years and terminal services which have been furnished by the carriers have during all of this time been considered to have been included in the line-haul rates. The moving of cars to samplers with-

in the smelters and to thaw houses during the winter months are part of the terminal services which plaintiff carriers have furnished the metal mining industry, and are necessary in order to determine the rate to be charged by the plaintiff carriers of the ores. The only manner in which the plaintiff carriers can determine the rate to be charged is to determine the value of the ore moved, and such value can only be determined by having the ore sampled.

In the dissenting opinion of Commissioner Alldredge in the case of *Anaconda Copper Mining Company*, 266 I. C. C. 387 (1946), an accurate statement is made of the practice prevailing in such cases.

Commissioner Alldredge said:

> "In my opinion, the evidence here clearly establishes that the services incident to the delivery of shipments within the industry plant area are both customary and reasonable. Throughout the entire non-ferrous metal industry of the West such a practice has been uniform for more than 50 years. It has not been shown by any evidence of record that the performance by respondents of such terminal services without compensation, in addition to that which is included in the line-haul rates, is preferential of this industry or prejudicial to any other industry or shipper." (R. 54)

This dissent was incorporated by reference in the report of the Interstate Commerce Commission in the American Smelting & Refining Company and the United States Smelting Refining and Mining Company cases herein involved (R. 51-79, 329).

There is nothing in the record in these cases to sustain the Commission in finding that the terminal services furnished by the plaintiff carriers are not included in the line-haul rates.

The Statutory Three-Judge Court in temporarily enjoining the Commission's respective orders of October 14, 1946, found that:

> "(2) We find that upon such basis the order is contrary to law in that there is no evidence before the Commission which justified the finding that such rates were not compensatory to the transportation companies for the service so rendered.
>
> "(3) That the sole evidence in the record which would justify a finding upon that point is to the contrary." (R. 299-300)

In its findings dated January 7, 1949, the Statutory Three-Judge Court also found:

> "(13) There was no evidence to support the Commission's findings that the 'plant yard' at Garfield, the 'hold tracks' at Murray, the 'flat yard' at Leadville, and the 'assembly yard' at Midvale, constitute reasonably convenient points for delivery to and receipt from the respective smelters of carload freight by the plaintiff carriers. On the contrary, the only evidence before the Comission was that such carriers, under the express provisions of their duly published tariffs, have for approximately fifty years delivered and received carload freight at actual points of unloading and loading at the respective smelters beyond such designated points, and have never delivered or received such freight at such designated points.
>
> "(14) That there was no evidence before the Commission to support its findings that the tracks at such designated points constitute industrial tracks of the respective plaintiff industries. On the contrary, the only evidence before the Commission was that the tracks at such designated points constitute the only available railroad terminal facilities of the plaintiff carriers for their ordinary railroad terminal handling of carload freight to and

from the respective smelters of the plaintiff industries, and, as such, are used in the same manner as any railroad terminal facilities are used by carriers generally, in bringing cars into their terminals for further disposition to consignees of inbound shipments, and for the assembling of outbound shipments into the carriers' road-haul trains.

"(15) There was no evidence before the Commission to sustain the Commission's findings that the common carrier transportation services which the plaintiff carriers are obligated to perform under the line-haul rates, begin and end at such designated points. On the contrary, the only evidence before the Commission was that the line-haul rates of the plaintiff carriers include compensation for all terminal switching services beyond such designated points, including any so-called 'interrupted movements' incident to determining the value of inbound shipments of non-ferrous ores and concentrates." (R. 455-456)

And further in this connection reference is particularly made to the concurring opinion of Judge Phillips in enjoining the Commission's orders of October 4, 1946, wherein he states that if the orders of the Commission are permitted to stand that:

"This would result in two charges for the same services."

Based upon the evidence in the record in these two cases and the finding of the Statutory Three-Judge Court it cannot be said that plaintiff industries have been receiving a preferential service or a refund of any rates collected.

If the orders of the Commission of May 28, 1948, should become effective requiring the plaintiff carriers to collect and the plaintiff industries to pay charges in addition to the line-haul rates for the terminal switching services, which have been customarily furnished by the carriers to the metal mining industry for the past fifty years,

the carriers will be required to collect and the industry to pay twice for the same service. This condition if brought about by the Commission will be in direct violation of Section 1 (5) (a) of the *Interstate Commerce Act* (Title 49, U.S.C.A.) which provides that:

> "All charges made for any service rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

In the absence of proof it cannot be presumed that the plaintiff carriers have been performing the terminal services in these cases gratuitously.

The case of *Interstate Commerce Commission v. Chicago, B. & Q. R. Co.*, 186 U.S. 321 (1902), was one in which the line-haul railroads transported cattle from various points in the United States to points in the Chicago stock yards from 1865 to 1894, and had used the tracks of the Union Stock Yards & Transit Company for delivery of the cattle without charge in addition to the line-haul rates from points of origin to Chicago. The tariff of the railroads provided for a charge of $2.00 per car for delivery services within the stock yards area, without any charge in line-haul rates.

The Court at page 336 said:

> "Under these circumstances in the absence of proof, can it be assumed that the carriers were, for the many years in question, gratuituously performing the terminal services? That such assumption may not be indulged in results from the ruling in Covington Stock Yards v. Keith, 139 U.S. 128, where it was decided that, as for a through rate to a given point, the carrier contracted to deliver at that point,

> the presumption was that the through rate included adequate compensation for the services rendered at point of delivery. Applying this principle, it results that the through rate existing prior to June the 1st, 1894, certainly in the absence of proof to the contrary, must be presumed to have provided in and of itself compensation for the services rendered in making delivery at the stockyards."

In deciding the issues in these cases this Court can well consider the words of Justice Holmes in the case of *Northern Securities Co. v. United States*, 193 U.S. 197, (1904) where he said:

> ". . . at times judges need for their work, the training of economists or statesmen, but must act in view of their foresight of consequences, . . ."

This Court should in its determination of these cases give careful consideration to the economic repercussions resulting from the final decision in the case. If transportation rates are to be increased by the imposition of a double charge for services furnished to the metal mining industry the result will be a further downward trend in mine operations in the West with a resultant decrease in ore supplies, which are so necessary toward the welfare of this great nation, both in times of peace and war.

CONCLUSION

It is submitted that the record in these cases conclusively establishes that there is no just reason in law or fact for the Interstate Commerce Commission to have its orders of May 18, 1948, enforced against the plaintiff industries or plaintiff carriers. It is submitted also that this Court should give careful consideration to the effect of the Commission's orders, if enforced, upon the metal min-

ing industry, which is ill and in need of some cure to continue to produce under our system of free enterprise.

Accordingly, the decision of the Statutory Three-Judge Court should be sustained and the orders of the Interstate Commerce Commission of May 18, 1948, permanently enjoined.

Respectfully submitted,

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January, 1950.